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IN THE

Supreme Court of the United States

CONNECTICUT DEP'T OF PUBLIC SAFETY, *ET AL.*,

Petitioners,

v.

JOHN DOE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE DISTRICT OF COLUMBIA AND THIRTY-FIVE STATES AND TERRITORIES IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires a State to offer a sex offender an individualized hearing on his current dangerousness before it may publicly disseminate information about his criminal convictions for sex offenses.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Many States Have Sex Offender Registration Laws Similar to the Law at Issue Here.. 6

II. *Paul v. Davis* Does Not Require a Hearing on Whether an Offender is Currently Dangerous Before Release of Public Record Information of His Convictions.. 13

A. There is No False Defamatory Statement 15

B. The "Stigma Factor" — The Publication Did Not Cause Serious Harm to the Plaintiff's Reputation . 18

C. The "Plus Factor" — There Was No Significant Alteration or Extinguishment of a Right or Status Previously Recognized by State Law 19

III. The Second Circuit Imposed a Substantive Limitation on the Publication of Conviction Records in Violation of *Paul*. 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Codd v. Velger, 429 U.S. 624 (1977) 16

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 17, 18,21, 22, 23

Craig v. Harney, 331 U.S. 367 (1947) 17, 23

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 15

Davis v. Paul, 505 F.2d 1180 (6th Cir. 1974), *rev'd*, 424 U.S. 701 (1976) 14

Doe #1 v. Williams, 167 F. Supp. 2d 45 (D.D.C. 2001), *appeal pending sub nom., John Does, 1-5 v. Anthony A. Williams*, Nos. 01-7162, 01-5394, 01-7176 (D.C. Cir.) 3

Doe v. Department of Public Safety, 271 F.3d 38 (2d Cir. 2001) 1, 4

Doe v. Lee, 132 F. Supp. 2d 57 (D.Conn. 2001) 3

Daniel Fullmer v. Michigan Dept. of State Police, 2002 U.S. Dist. LEXIS 10111 (E.D. Mich. 01-73319, June 3, 2002), *appeal pending, No. 02-1731 (6th Cir.)* *4*

E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) 7

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 16

Florida Star v. B.J.F., 491 U.S. 524 (1989) 17

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 15

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 17

Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867 (2002) 13, 21

Kansas v. Hendricks, 521 U.S. 346 (1997) 21

McKune v. Lile, 536 U.S. ___, 122 S.Ct. 2017 (2002) 7, 13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ... 15

Paul v. Davis, 424 U.S. 693 (1976) ..... *passim*

Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 17

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 16

Rust v. Sullivan, 500 U.S. 173 (1991) 16

State v. Putnoki, 200 Conn. 208, 510 A.2d 1329 (1986) .. 13

Time, Inc. v. Hill, 385 U.S. 374 (1967) 15, 18

STATUTES

20 U.S.C. §1092(f)(1) 13

42 U.S.C. § 14071 ..... 2, 6, 7, 13

42 U.S.C. § 14071(a)(1) 9

42 U.S.C. § 14071(a)(1)(A) 2, 8

42 U.S.C. § 14071(a)(3)(B) 9

42 U.S.C. §14071(a)(3)(C) 10

42 U.S.C. § 14071(b)(1) 10

42 U.S.C. § 14071(e)(1) 10

42 U.S.C. § 14071(e)(2) 11

42 U.S.C. § 14071(f) 2, 9

42 U.S.C. § 14071(j) 13

42 U.S.C. § 14072 ..... 7, 8

42 U.S.C. § 3756 ..... 2, 9

18 U.S.C. § 2241 ..... 9, 10

18 U.S.C. § 2242 9

Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b) and (c), 114 Stat. 1537, 1538 12

Ala. Code §§ 15-20-25(b), 15-20-21(1) 12

Alaska Stat. 18.65.087 12

Cal. Pen. Code § 290.4 12

Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001) ... 12

Tit. 11, Del. Code Ann. § 4121(e) (Supp.2000) 12

Fla. Stat. Ann. §§ 943.043(1) and 943.0435(1)(a) (West 2001) 12

Ga. Code Ann. § 42-9-44.1 (1997) 12

Haw. Rev. Stat. § 846E-3 (Supp. 2000) 12

Ill. Rev. Stat. Ch. 730, paras 152/115, /120(c) 12

Ind. Code Ann. § 5-2-12-11(b) (Michie 2001) 12

La. Rev. Stat. Ann. § 15:546 12

2001 Md. Laws ch. 10, § 2 (revising Md. Crim. Proc. Code Ann. § 11-717(b)) 12

Mich. Comp. Laws Ann. § 28.728(2) (West 2001) 12

Miss. Code Ann. § 45-33-49 (Supp. 2001) 12

Mo. Ann. Rev. Stat. § 589.417(2) (West Supp. 2002) 12

N.C. Gen. Stat. §14-208.15 (1993) 12

N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000) 12
Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002) 12
Or. Rev. Stat. § 181.592 (1999) 12
S.C. Code Ann. Rev. §23-3-490 (2002) 12
Tenn. Code Ann. § 40-39-106(f) (1997) 12
Tex. Crim. Pro. Code Ann. Art. 62.08 (West Supp. 2002) 12
Utah Code Ann. § 77-27-21.5 (2001) 12
Va. Code Ann. § 19.2-390.1(B-D) (Michie 2002) 12
W. Va. Code § 15-12-2(h) (2000) 12
Wis. Stat. Ann. § 301.46(5n) (West Supp. 2000) 12

OTHER

64 Fed. Reg. 582 ..... 10, 11
H.R. Rep. No. 392, 103d Con., 1st Sess. (1993) 6, 8
Gene G. Abel, *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 3 J. Interpersonal Violence (1987) 8
Panel Discussion, 63 Fordham L. Rev. 125 (1994) 8
U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* (1996) 7
U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Victimization in the U.S.*, 1999 *Statistical Tables*, Table 93 (Jan. 2001) 8
U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* (1997) .. 7

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INTEREST OF *AMICI CURIAE*

This brief is submitted by the District of Columbia and by 35 states and territories in support of the petitioner, the Connecticut Department of Public Safety, and seeks reversal of *Doe v. Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001). In that decision, the Second Circuit held that Connecticut's sex offender registration and notification law is unconstitutional on the ground that it violates the procedural component of the Due Process Clause of the Fourteenth Amendment. The Second Circuit ruled that Connecticut must give convicted sex offenders residing or working in the state a hearing on whether they are "currently dangerous" and likely to repeat their offenses before it may notify the public of their convictions.

Connecticut's law was enacted to conform to federal requirements set forth in the 1994 federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act; the 1996 federal Megan's Law; the 1996 Pam Lynchner Act; and the 1998 Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act. 42 U.S.C. § 14071. The Attorney General is directed to establish guidelines for state programs that require persons convicted of crimes against minors or crimes of sexual violence to register and provide their addresses and other information to state or local law enforcement officials and for public notification of the offenders. 42 U.S.C. § 14071(a)(1)(A). A state's failure to enact qualifying legislation could result in a ten per cent reduction in the state's share of crime prevention and law enforcement assistance funds under 42 U.S.C. § 3756. 42 U.S.C. § 14071(f).

The intent of both the federal and state legislation is to permit the monitoring of the whereabouts of convicted sex offenders; to facilitate the investigation of sex crimes; and to disseminate information about registered sex offenders to the public so they may take measures to protect themselves. An unusually large proportion of victims are children and juveniles. Notification deprives offenders of the anonymity and secrecy on which they depend for their crimes and permits citizens to protect themselves and their children from falling prey to the offenders.

All states and the District of Columbia have enacted sex offender registration laws to conform to these federal requirements. Connecticut adopted one of two major approaches to comply with federal requirements for sex offender registration, under which the requirements for registration and the extent of community notification are based exclusively on the nature of the offense committed by the offender. The other major approach, which the Second Circuit has held is constitutionally mandated, requires an individualized determination of current

dangerousness before a state may publicize a sexual offender's criminal convictions. A number of states and the District of Columbia have enacted registration laws like that of Connecticut. Other states have enacted hybrid statutes, under which the offender's offense alone (generally violent offenses or offenses against children) triggers the requirement of registration and the extent of public notification for more serious offenders, while individualized risk assessments are required for offenders who have committed other less serious offenses.

The laws of the states and of the District of Columbia which have provisions similar to those of Connecticut are subject to similar constitutional challenges.[1] For example, based in part on the lower court decision in this case, *Doe v. Lee*, 132 F.Supp.2d 57 (D.Conn. 2001), the public notification provisions of District of Columbia's sex offender registration act have and the Michigan act been held to be unconstitutional and their operation enjoined. *See Doe #1 v. Williams*, 167 F.Supp.2d 45 (D.D.C. 2001), *appeal pending sub nom., John Does, 1-5 v. Anthony A. Williams*, Nos. 01-7162, 01-5394, 01-7176 (D.C. Cir.) and *Daniel Fullmer v. Michigan Dept. of State Police*, 2002 U.S. Dist. LEXIS 10111 (E.D. Mich. 01-73319, June 3, 2002), *appeal pending, No. 02-1731 (6th Cir.)*.

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[1] States that employ individualized risk assessments in their sex offender registration programs also have an interest in this case. If the Second Circuit's decision stands, these states' risk-assessment mechanisms might be made subject to due-process scrutiny even in cases where the risk assessment leads to nothing more than public disclosure of the bare fact of the offender's conviction. Additionally, these states would be frozen into their current systems and could not change to an offense-based or hybrid system as the District of Columbia did just two years ago. Accordingly, the signatories of this brief include several states that employ individualized risk-assessment mechanisms.

SUMMARY OF ARGUMENT

Connecticut's sex offender notification law, similar to laws of twenty-four other states, has been held to be unconstitutional on the ground that it violates the procedural component of the Due Process Clause of the Fourteenth Amendment. The Second Circuit has held that Connecticut must give convicted sex offenders residing, working, or attending school in the state a hearing on whether "they are particularly likely to be currently dangerous" before it may provide the public with public record information relating to their convictions. 271 F.3d at 62. Although its decision rests on procedural grounds, the Second Circuit imposed a substantive limitation on the release of conviction records, because it is not possible to restructure the statutory scheme to avoid this limitation.

The Second Circuit misapplied *Paul v. Davis*, 424 U.S. 693 (1976), the decision on which it most heavily relied in striking down Connecticut's law. *Paul* dealt with the question of the extent to which a person has a constitutional claim against state or local officials for the release of false and defamatory information about him. The Second Circuit expanded *Paul* beyond its limits. Sexual offender notification provisions relate to the release of truthful, public-record information. The Connecticut sex offender registry consists only of information that is already of public record – namely criminal trials, required by the Sixth Amendment to be public, in which sex offenders included in the registry have been convicted of a sexual offense or otherwise adjudicated to have committed such an offense.

The Second Circuit did not find falsity in what Connecticut said but in the implication which can be drawn from reporting that an individual has been convicted of rape or some other serious sexual offense. (A. 17-18). The court ruled that the implication to be drawn from a system which reports such

convictions to the public, along with objective, verified identifying information, is the statement that the convict is currently dangerous. This implication can be drawn even though Connecticut included in its public notification the statement that it had made "no determination that any individual in the Registry is currently dangerous." (A. 9). It is a serious misreading of *Paul* to find falsity and defamation in the truthful report that a person has previously been convicted of a serious sexual offense. *Paul* does not require states to give a convict a hearing on whether he is "currently dangerous" before the public-record fact of a serious criminal conviction can be reported.

Any "stigma" or harm that resulted to the plaintiff's reputation was from the fact of conviction of a sexual offense and not from public notification of registry information. Plaintiff alone is responsible for any stigma resulting from his crime. To state a constitutional tort under *Paul*, plaintiff was required to show the existence of the "plus" factor — the material alteration of a state entitlement or right as a result of the public notification of his convictions. He failed to meet that burden. The requirement that he register as an offender and provide identifying information is no more burdensome than the requirement that a (presumably innocent) person who is arrested and charged provide such information. His showing in this regard is indistinguishable from that in *Paul*.

That Connecticut's notification scheme is consistent with constitutional requirements also necessarily follows from *Paul's* holding that there is no substantive right to prevent a state or local government from reporting the fact of an arrest. The Court rejected plaintiff's arguement that "the State may not publicize a record of an arrest," because of a "right of privacy" guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. 424 U.S. at 712-14. The Court stated that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." This reasoning

applies with much stronger force where, as here, the fact of a conviction, rather than a mere arrest, is publicized.

ARGUMENT

I. MANY STATES HAVE SEX OFFENDER REGISTRATION LAWS SIMILAR TO THE LAW AT ISSUE HERE.

All states and the District of Columbia have sex offender registration laws which conform to federal requirements designed to protect children and adults from known child molesters and known sexually violent offenders. The first federal statute to be enacted, as part of the 1994 federal crime bill, is the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which set national standards for state sex offender registration laws.[2] 42 U.S.C. § 14071. In 1996, the law was amended by the federal Megan's Law to require community notification of the identity of persons required to register.[3] 42 U.S.C. § 14071. The law was amended

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[2] The law was named for eleven-year-old Jacob Wetterling who was abducted at gunpoint by a masked man as he was returning home from a convenience store in St. Joseph, Minnesota, in 1989 and was never found. H.R. Rep. No. 392, 103d Con., 1st Sess. 3 (1993).

[3] The law was named for seven-year-old Megan Kanka, who was was raped and murdered by a neighbor in 1994. The neighbor enticed Megan into his home with an invitation to see his puppy and then raped and killed her. Megan's body was found several days later in a plastic bag in a nearby wooded area. The neighbor had previously been convicted twice of child molestation and moved into the house across from the Megan's upon his release from prison; he lived there with two other convicted sex offenders. Neither Megan's parents nor other neighbors knew anything about his history or that of the other occupants of the house. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

again in 1996 by the Pam Lychner Sexual Offender Tracking and Identification Act. Among other things, this amendment directs the Federal Bureau of Investigation to establish a national database of sex offenders to assist law enforcement agencies in tracking sex offenders when they move from one state to another. 42 U.S.C. § 14072.

These federal laws and state laws implementing them were enacted in recognition that sex crimes are rampant and "[s]ex offenders are a serious threat in this nation." *McKune v. Lile*, slip op. at 5, 536 U.S. ___, 122 S.Ct. 2017, ____ (2002). Statistics compiled and studies done by the U.S Department of Justice, Bureau of Justice Statistics indicate that, in 1995, an estimated 355,000 rapes and assaults occurred nationwide; a majority of the victims of sexual assault are juveniles or children (nearly 40% of imprisoned violent sex offenders said their victims were 12 or younger); and convicted sex offenders are more likely than any other type of offender to be rearrested for a new offense.[4] Between 1980 and 1994, the population of

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[4] U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* 1 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, p. 6 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 2 (1996); U.S. Dep't of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 6 (1997); U. S. Dep't of Justice, Bureau of Justice Statistics, *National Conf. on Sex Offender Registries* (*National Conf.*) 93 (Apr. 1998); U. S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement* (*Young Children*) 2 (July 2000); U. S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* (*Recidivism*) 10,

imprisoned sex offenders increased at a faster rate than for any other category of violent crime.

In addition, many sex crimes are not reported to authorities. Nearly 70% of sex crimes and 90% of child molestation offenses go unreported. U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Victimization in the U.S.*, 1999 *Statistical Tables*, Table 93 (Jan. 2001); H.R. Rep. No. 392, 103rd Cong., 1st Sess. 4 (1993). The under-reporting is confirmed by empirical study. In a study of 561 non-incarcerated, self-reported sex offenders, the 126 offenders who had committed rape reported committing a total of 907 rapes on 882 different victims; men who targeted boys had an average of 150 victims, while men who targeted girls had an average of 19 victims. Gene G. Abel, *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 3 J. Interpersonal Violence 3, 15-16 (1987); see also, *Panel Discussion*, 63 Fordham L. Rev. 125, 135-45 (1994). The statutes address these problems.

Federal law requires the Attorney General to establish guidelines for state programs to require persons convicted of crimes against minors or crimes of sexual violence to register and provide their addresses and other information to state or local law-enforcement officials. 42 U.S.C. § 14071(a)(1)(A).[5] A state's failure to enact qualifying legislation could result in a ten percent reduction in the state's share of crime prevention and law-enforcement assistance funds under 42 U.S.C. § 3756, known as the Edward Byrne Act. *See* 42 U.S.C. § 14071(f).

Table 11 (June 2002).

[5] In the event a state fails to establish a qualifying sexual offender registration system, sexual offenders in that state are required to register with the Federal Bureau of Investigation. 42 U.S.C. § 14072(c).

The law requires that state programs must include in their registries persons convicted of enumerated sexual and other criminal offenses against a minor, sexually violent offenses, and what the law defines as a "sexually violent predator." 42 U.S.C. § 14071(a)(1). The term "criminal offense against a victim who is a minor" includes kidnapping or false imprisonment of a minor, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct or to practice prostitution; use of a minor in a sexual performance; or any criminal conduct that is a sexual offense against a minor; and attempts to commit any of these offenses. 42 U.S.C. § 14071(a)(3)(A).

A "sexually violent offense" is an offense which is comparable to "aggravated sexual abuse" or "sexual abuse" described in 18 U.S.C. §§ 2241 and 2241 or attempts to commit these offenses. 42 U.S.C. § 14071(a)(3)(B). "Aggravated sexual abuse" is an offense under which a person (1) "knowingly causes another person to engage in a sexual act" by force or by threat or by placing that person in fear of "death, serious bodily injury, or kidnapping;" or (2) engages in a sexual act after rendering the victim unconscious or by administering a drug or intoxicant that substantially impairs the ability of that person to appraise or control conduct. 18 U.S.C. § 2241. "Aggravated sexual abuse" is also defined as a sexual act with a child under 12 years of age or under 16 years of age if the perpetrator is at least four years older than the victim. *Id.* "Sexual abuse" is engaging in a sexual act by placing the person in fear other than fear of death, serious bodily injury, or kidnapping or engaging in a sexual act with a person "incapable of appraising the nature of the conduct" or "physically incapable" of declining participation or communicating unwillingness to engage in the sex act. 18 U.S.C. § 2242. A "sexually violent predator" is a person who has been convicted of a sexually violent offense and has a mental abnormality or personality disorder that makes the person likely

to engage in predatory sexually violent offenses. 42 U.S.C. § 14071(a)(3)(C).

The registration period is for life or for a minimum period of ten years. 42 U.S.C. § 14071(b)(6)(A) & (B). A person must register for life if (1) he has committed more than one registration offense; (2) he has committed an "aggravated" offense, like those described in 18 U.S.C. § 2241; or (3) he is a "sexually violent predator." 42 U.S.C. § 14071(b)(6)(B). Those convicted of other registration offenses must register for a period of 10 years. 42 U.S.C. § 14071(b)(6)(A). The states must collect specific information from registrants, including home and work addresses, fingerprints and a photograph. 42 U.S.C. § 14071(b)(1). Registrants must report changes of address, and state officials are required to verify registrant information at least annually. 42 U.S.C. § 14071(b)(1)&(3). States are required to obtain additional information from sexually violent predators, including identifying factors, anticipated future residence, offense history and any treatment received for mental abnormality or personality disorder and must verify information every 90 days. *Id.*

Federal law permits states to release information collected under their registration programs "for any purpose permitted under the laws of the State." 42 U.S.C. § 14071(e)(1). The guidelines mention the broad discretion that states have to release information, stating that "there is no requirement under the Act that registration information be treated as private or confidential to any greater degree than the state may wish." 62 Fed.Reg. 581 (Jan. 5, 1999). A state is required to release information to the community "that is necessary to protect the public concerning a specific person required to register under" the federal law. 42 U.S.C. § 14071(e)(2).[6]

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[6] The Department of Justice Guidelines suggest any one of three different approaches for community notification:

Connecticut, twenty-four other states, and the District of Columbia have all based community notification primarily on the nature of the offense committed by the offender rather than other characteristics of the offender or the use of individualized risk factors.[7] This type of notification flows from the Wetterling Act,

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> One type of approach ... involves particularized risk assessments of registered offenders, with differing degrees of information release based on the degree of risk. ...
>
> States also are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories. ...
>
> Another approach by which states can comply with the Act is to make information accessible to members of the public on request. This may be done, for example, by making registration lists open for inspection by the public, or by establishing procedures to provide information concerning the registration status of identified individuals in response to requests by members of the public. ...

64 Fed. Reg. 582.

[7] See Ala. Code §§ 15-20-25(b), 15-20-21(1); Alaska Stat. 18.65.087; Cal. Pen. Code § 290.4; Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001); Tit. 11, Del. Code Ann. § 4121(e) (Supp. 2000); Fla. Stat. Ann. §§ 943.043(1) and 943.0435(1)(a) (West 2001); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat.

because that is the approach Congress took in enacting the law. Except in dealing with sexually violent predators, the Wetterling Act is geared only to the nature of the offense committed by the offender.[8] It is undoubtedly the reason that Connecticut and other states have chosen this means for community notification. Congress also took this approach in its most recent sex offender law, requiring categorical disclosure of sex offenders enrolled in or employed at institutions of higher education. See Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b) and (c), 114 Stat. 1537, 1538 (to be codified at 20 U.S.C. § 1092(f)(1), and 42 U.S.C. § 14071(j)).

One practical consideration that supports Connecticut's choice is the difficulty that would sometimes exist in predicting whether an offender is "currently dangerous" following an individualized hearing. It is likely that very few offenders would

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§ 846E-3 (Supp. 2000); Ill. Rev. Stat. Ch. 730, paras. 152/115, /120(c); Ind. Code Ann. § 5-2-12-11(b) (Michie 2001); La. Rev. Stat. Ann. § 15:546; 2001 Md. Laws ch. 10, § 2 (revising Md. Crim. Proc. Code Ann. § 11-717(b)); Mich. Comp. Laws Ann. § 28.728(2) (West 2001); Miss. Code Ann. § 45-33-49 (Supp. 2001); Mo. Ann. Rev. Stat. § 589.417(2) (West Supp. 2002); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (1993); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (1999); S.C. Code Ann. Rev. § 23-3-490 (2002); Tenn. Code Ann. § 40-39-106(f) (1997); Tex. Crim. Pro. Code Ann. Art. 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (2001); Va. Code Ann. § 19.2-390.1(B-D) (Michie 2002); W. Va. Code § 15-12-2(h) (2000); and Wis. Stat. Ann. § 301.46(5n) (West Supp. 2000).

[8] Counsel for petitioners informed us that the Department of Justice granted Connecticut a waiver of the requirement that it include the category of "sexually violent predator" in its registration system.

cooperate in the hearing by fully disclosing their histories, thereby decreasing the reliability of a final decision as to dangerousness. This affects the reliability of a final decision as to dangerousness. *Cf., McKune v. Lile, supra*, slip op. at 5-7, 122 S.Ct. at ____ . In this regard, the Supreme Court of Connecticut, in a decision which may have influenced its legislature in enacting the statute at issue here noted that such predictions are considered by experts to be "tentative at best," and "frequently conceded" to be "unreliable." *State v. Putnoki*, 200 Conn. 208, 220, 510 A.2d 1329, 1335 (1986). It was therefore reasonable for the Connecticut legislature to choose to give truthful conviction information as to all sex offenders, rather than to attempt to establish who among them is "currently dangerous."[9]

II. *Paul v. Davis* Does Not Require a Hearing on Whether an Offender is Currently Dangerous Before Release of Public Record Information of His Convictions.

The central issue in this case is whether the Constitution prohibits governments from disseminating truthful conviction

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[9] It would appear to be more difficult to make a prediction of dangerousness under the notification statutes than under the civil commitment statutes. That is because civil commitment statutes apply only to a limited number of offenders where a state can prove the existence of a "mental abnormality" or "personality disorder" or mental illness coupled with dangerousness and lack of control. *Kansas v. Hendricks*, 521 U.S. 346, 356, 360 (1997); *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 869 (2002). The proof of such an abnormality, disorder, or mental illness often aids in the forecast of future dangerousness because of the known behavioral patterns of people with them. A much larger portion of the offender population has no such disorders or abnormalities and is subject only to the registration and notification statute.

information to the public from public records— judicial records — about the sex offenses committed by sex offenders. The collection and dissemination of that information is done pursuant to state laws, whose provisions conform to the requirements of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and Megan's Law, as amended, 42 U.S.C. § 14071. The Second Circuit held that conviction information can be released to the public only if states first make a determination that the sex offenders are currently dangerous in the sense that they are likely to repeat their offenses.

The Second Circuit misconstrued *Paul v. Davis*, 424 U.S. 693 (1976), which is the decision on which it most heavily relied. In *Paul*, the Court held that the practice of a city police force of disseminating information regarding suspected shoplifters did not violate either the substantive or the procedural component of the Due Process Clause of the Fourteenth Amendment. *Paul* involved an "Active Shoplifters" offender list which was very similar in salient respects to the sex offender registry involved in this case. It had been maintained by the police department of the City of Louisville, Kentucky for fifteen years.[10] The principal difference is that only a conviction will suffice to place a sex offender on Connecticut's offender registry, while a mere arrest was sufficient in *Paul*.

The "Active Shoplifters" list had a cover memorandum and five pages of names with the pictures of those who had been arrested for or suspected of shoplifting. The memorandum provided, in part:

> The Chiefs of The Jefferson County and City of Louisville Police Departments, in an

[10] *See Davis v. Paul*, 505 F.2d 1180, 1181 n. 1 (6th Cir. 1974), *rev'd*, 424 U.S. 701 (1976).

> effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in the criminal field.
>
> This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.
>
> Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing .... [424 U.S. at 695]

Paul recognized a constitutional tort similar to defamation where a defamatory statement by government officials results in stigma-plus. Specifically, a plaintiff must demonstrate each of the following elements for the constitutional tort the Court recognized: (1) a statement which falsely defames the plaintiff; (2) the "Stigma Factor"— a serious harm to the plaintiff's reputation; and (3) the "Plus Factor" — a significant alteration or extinguishment of a right or status previously recognized by state law. 424 U.S. at 708, 710-12. The third factor differentiates a state law defamation claim from a constitutional tort. None of these elements of the cause of action is met here.

A. There is No False Defamatory Statement.

There is no false defamatory statement. In order to establish the first element of the *Paul* cause of action, a plaintiff must demonstrate that the statement made by government officials falsely harmed his reputation. Falsity is an element of every cause of action for defamation the Court has permitted to go forward under the First Amendment. *See Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 347 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152, 164 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 386-89 (1967); *New York Times v. Sullivan Co*, 376 U.S. 254 (1964). In the closely related legal doctrine relating to name clearing hearings under the Due Process Clause, a former government employee is not entitled to a hearing unless he asserts that the material in question is "substantially false." *Codd v. Velger*, 429 U.S. 624, 627-28 (1977) (*per curiam*).

Under its sex offender law, Connecticut has disseminated the true, public fact that offenders included in the registry were convicted or found not guilty by reason of insanity of designated sex offenses. Before anyone on the registry was convicted or found not guilty by reason of insanity of that sex offense, he had the extensive procedural protections afforded by the criminal justice system. At the end of that process, that person was adjudicated to be a "sex offender." Connecticut does nothing more than disseminate this adjudicated fact to the public. That is all of the process contemplated by *Paul*.

Congress and the state legislatures may disseminate information in furtherance of the goals of programs they establish. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995).[11] Sex offenders' criminal convictions may be published under this authority, because "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion); see also *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property."). These are

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[11] See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("[t]he inherent worth of ... speech ... does not depend upon the identity of its source, whether corporation, association, union or individual").

principles under which access to criminal proceedings and records have been granted and the right of publication recognized.

There is simply no basis on which a federal court may enjoin the publication of criminal convictions. The First Amendment guarantees the right to publish the name of the victim of a rape or other sex offense when it appears in the public record. Thus, in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a newspaper published the name of a victim of a sexual assault after learning the name from a police report placed in the police department's pressroom. 491 U.S. at 527. This Court held that the First Amendment barred prosecution of the newspaper under a statute mading it unlawful to publish the name of the victim of a sexual offense, because the information was "truthful" and had been "lawfully obtained." *Id.*, at 534. See also *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (reversing California state court's closure of six weeks of voir dire of jury in a criminal case charging the defendant with rape and murder of a teenage girl); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute mandating closure of courtrooms during minor rape victims' testimony is unconstitutional); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the public record).

Connecticut publishes identifying information for each offender, including the offender's name, home address, aliases, date of birth, criminal conviction information, place of employment, and a photograph. This information is necessary for the publication to serve its intended purpose, and differentiates the release of conviction records of individual offenders from the mere dissemination of crime statistics. Identifying information is plainly not falsely defamatory.

The Second Circuit did not find that the registry contained any false statement. Instead, it ruled the public dissemination of registry information implies that sexual offenders on the registry are currently dangerous. The finding of an implicit assertion of dangerousness is directly contrary to explicit statements which accompany the registry that Connecticut "has not considered or assessed the specific risk of reoffense with regard to any individual" registrant and that it "has made no determination that any individual in the Registry is currently dangerous."

The Second Circuit's decision to strike down the law is based on the apparent assumption that the general public does not understand such statements and cannot evaluate public record information. That assumption is contrary to the usual assumption in our jurisprudence that the public is capable of evaluating truthful information and that information from public records is in the public domain and can be disseminated. *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. 469, 492-97 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 386-88 (1967).

B. The "Stigma Factor" — The Publication Did Not Cause Serious Harm to the Plaintiff's Reputation.

The second element in *Paul* is not met, because harm to plaintiff's reputation is not caused by the publication of registration information. The source of any stigma is not the listing, but the commission of the sex offense for which the plaintiff was convicted in criminal proceedings where he was provided the procedural protections granted by the Constitution. Plaintiff alone is responsible for any stigma resulting from his crimes. The consequences do not result from the sex offender law but from the offender's convictions.

The stigma the Second Circuit found here did not result from what Connecticut said about the plaintiff but from his inclusion in a published register that included all other sex offenders in the state. He was treated the same as other sex

offenders in that truthful information about his convictions was published. Some of the offenders are conceded to be currently dangerous. The stigma he alleges resulted from the implication that he was also dangerous. That stigma was dispelled by the disclaimer that no determination as to current dangerousness had been made as to any of the listed offenders.

The idea that there can be defamation by implication as the Second Circuit found here must be rejected. Connecticut authorities determined in advance what information was to be collected from offenders and what was to be published. They collected objective, verifiable information that included only convictions and identifying information. They treated all offenders equally. The authorities also dispelled the very implication that plaintiffs sought to draw. There is no defamation by implication here.

C. The "Plus Factor" — There Was No Significant Alteration or Extinguishment of a Right or Status Previously Recognized by State Law.

The "plus factor" separates the constitutional cause of action recognized by *Paul* from an ordinary, common-law action for defamation. In order to state a constitutional cause of action under *Paul,* plaintiff was required to show the material alteration in a state entitlement or right as a result of the notification of his sex offender status. 424 U.S. at 711. In holding that plaintiff met that test, the Second Circuit pointed to the "registration duties imposed by Connecticut's sex offender law." Pet. App. A30.

The Second Circuit held that *Paul's* "plus factor" is met if a plaintiff "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." Pet. App. A29. It then held that the registration obligations imposed by Connecticut's SORA provided the necessary governmental involvement. This is a distinction

where there is little difference. In *Paul*, the plaintiff had been required to give virtually the same identifying information when he was arrested and charged that a sex offender gives when he registers, unless he was willing to be detained until the government obtained it independently. The *Paul* plaintiff could no more refuse to give that information than could a sex offender refuse under the Connecticut statute. In short, there will be "an indicium of governmental involvement" virtually anytime the government collects information which it later publishes. There will often be some element of compulsion. If that is sufficient to meet *Paul's* plus factor, it effectively overrules that decision.

III. The Second Circuit Imposed a Substantive Limitation on the Publication of Conviction Records in Violation of *Paul.*

The Second Circuit imposed a substantive limitation on the release of conviction records even though it rested its holding on procedural due process grounds. This contradicts a square holding in *Paul*.

The ruling that Connecticut makes an implicit statement that a sex offender is currently dangerous when it releases the offender's conviction record and, therefore, cannot release that information without first affording an offender a hearing on the question of current dangerousness is a substantive limitation on the public dissemination of a sex offender's criminal history. That is so, because Connecticut expressly stated that it had made no determination that any individual in the registry is currently dangerous.[12] Thus, the implicit statement that the Second Circuit

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[12] The statement that Connecticut makes with the release of record information is:

> The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry and has made no determination that any individual in the Registry is currently dangerous. (A. 9).

found Connecticut to have made is directly contrary to the explicit statement that accompanied release of the information.

The Second Circuit prohibits or limits the release of sex offender convictions unless Connecticut undertakes a risk assessment which concludes that a person poses a danger is made first, if the offender requests such an assessment. This showing approaches and may even exceed that necessary for the civil commitment of a sexual predator. *Kansas v. Crane*, 122 S.Ct. 867, 870 (2002) (To civilly commit, "there must be proof of serious difficulty in controlling behavior."); *Kansas v. Hendricks*, 521 U.S. 346 (1997). Connecticut was not attempting to civilly commit sex offenders here; it was merely publishing public record information relating to their convictions. There is a big difference.

Such a difference is recognized in the cases. In *Paul*, the plaintiff argued that "the State may not publicize a record of an arrest" where the charges against him had been dismissed, basing his argument on a "right of privacy" guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. 424 U.S. at 712-714. The Court responded that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." This reasoning applies with much stronger force where, as here, the fact of a conviction, rather than a mere arrest that did not result in a conviction, is publicized.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court held that a state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records

which are maintained in connection with a pubic prosecution and which themselves are open to public inspection." *Id.* at 491. I stated the broad principle that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496. Thus, the rape victim could not be protected from having her name published when her name was taken from public records and court proceedings, in contravention of local statutes.[13]

The practical effect of the decision below is to prohibit the dissemination of the name of the rapist although his victim's name may be publicized. This result is wrong and should not stand. The "good" name and reputation of the rapist cannot receive constitutional protection where similar protections are denied his victim.

The Court based its decision in *Cox Broadcasting* on the fact that the information published was truthful and that it was already in the public domain on official court records. The Court stated:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public

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[13] In *Cox*, a broadcast reporter covered a criminal trial in Georgia in which the defendant was convicted of raping and murdering his victim. The reporter uncovered the name of the victim from court records, including the indictment. He broadcast the victim's name in violation of a Georgia statute, which made it a misdemeanor to broadcast or otherwise report "the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made." The victim's family obtained a civil, tort recovery based on a private action under the statute. The Supreme Court of Georgia held that the statute did not violate the First Amendment. 420 U.S. at 470-76.

> interest was thereby served. Public records by their very nature are of interest to those concerned with the administration of government .... In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official records open to public inspection.

420 U.S. at 493. The Court also noted that special protection is given to reports of judicial proceedings. *Id.* at 492-93, citing *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property.").

Under its sex offender statute, Connecticut merely disseminates the true, public fact that a person was convicted or found not guilty by reason of insanity of a designated sex offense. Before that person was convicted or found not guilty by reason of insanity of that sex offense, he had the extensive procedural protections afforded by our criminal justice system. At the end of that process, that person was adjudicated to be a "sex offender." The statute does nothing more than disseminate this adjudicated fact to the public.

CONCLUSION

The judgment of the Second Circuit should be reversed.

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